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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Was it a violation of Title VII, under the reasoning of *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), for the State of Arizona to contract with independent insurance companies which used sex-based actuarial tables for the purpose of giving its employees the option of receiving their deferred compensation in the form of annuity payments, even though:

(a) the employees could elect to receive their deferred compensation in a lump sum and purchase the largest benefit which their accumulated contributions could command on the open market;

(b) all of the insurance companies which were available to the State of Arizona to provide such life annuities used sex-based mortality tables and therefore Arizona had no choice but to offer sex-based life annuities if that option was to be offered at all; and

(c) the district court found that Arizona had no intent to discriminate because the sex-based actuarial tables were the result of the judgment of the insurance companies?

2. Was it an abuse of discretion for a federal court to order the State of Arizona to supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those made to similarly situated male employees:

(a) where the state legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan; and

(b) where the state was not responsible for the establishment or use of actuarial tables upon which the independent insurance companies based these life annuities?[1]

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[1] Petitioners have decided not to raise the issue set forth in their Petition for Writ of Certiorari as to whether the relief violates the Tenth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are Nathalie Norris, on behalf of herself and all others similarly situated, plaintiff-appellee; Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, the State of Arizona, and Richard Rabago, Margaret Griffith, Ted Williams, Russ Webb, Walter Madsen, Dave Conner, and Jack La Sota in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, defendants-appellants below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

BRIEF 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Description Of The Plan 3

II. Proceedings Below 6

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. Under The Reasoning Of This Court's Decision In *Manhart*, Petitioners Were Not Liable Under Title VII 10

A. In The Instant Case, Unlike *Manhart*, Independent Insurance Companies, Not The Employer, Treated Females Differently On The Basis Of Sex 11

B. The Instant Plan Falls Squarely Within The Open Market Exception Stated In *Manhart* And Is Therefore Lawful 13

II. Petitioners Cannot Be Held Liable Under Title VII For Practices In The Marketplace Over Which They Have No Control 17

III. Petitioners Cannot Be Held Liable For Discriminatory Treatment Under Title VII Where There Is A Finding That Petitioners Did Not Intend To Discriminate 23

IV. The Relief Ordered By The Courts Below Is An Abuse Of Discretion 28

CONCLUSION 33

TABLE OF AUTHORITIES

CASES — PAGE

Airline Pilots Ass'n Int. v. Western Air Lines, Inc., 23 FEP Cases 1042 (N.D. Cal. 1979) 21

Barone v. Hackett, 28 FEP Cases 1765 (D. R.I. 1982) 21, 22

Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wisc. 1982) 21, 22

Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) 29

Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977) 21

Connecticut v. Teal, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 130 (June 21, 1982) 24

EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) 16, 17, 23

EEOC v. Enterprise Association Steamfitters Local No. 638, 542 F. 2d 579 (2d Cir. 1976) 29

Ford Motor Co. v. EEOC, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721 (June 28, 1982) 32

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 23

General Building Contractors Assoc., Inc. v. Pennsylvania, ___ U.S. ___, 102 S.Ct. 3141, 73 L.Ed.2d 835 (June 29, 1982) 12, 20, 23

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 8, 17, 18, 20, 27

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) 29

Hairston v. McLean Trucking Co., 62 F.R.D. 642 (M.D.N.C. 1974) 29, 30

Hannahs v. N.Y. State Teachers' Retirement System, 26 EPD ¶ 32,037; 26 FEP Cases 527 (S.D.N.Y. 1981) 16

Harris v. McRae, 448 U.S. 297 (1980) 8, 17, 19, 20

Henderson v. State of Oregon, 405 F. Supp. 1271 (D. Ore. 1975) 16

CASES — PAGE

Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973) 26
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) ..... *Passim*
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 23
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 17, 19, 20
Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *aff'g* 486 F. Supp. 645 (D. Ariz. 1980) 2, 10, 12, 14, 21, 25, 28
Ortega v. Usery, 441 F. Supp. 100 (D. Conn. 1977) 30
Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) .. 27
Peters v. Wayne State University, ___ F.2d ___, Nos. 79-1658, -1670, -1671 (6th Cir. October 14, 1982) 12, 23
Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) 26
Sobel v. Yeshiva University, 477 F. Supp. 1161 (S.D.N.Y. 1979) ... 23
Spirt v. Teachers Insurance and Annuity Association, ___ F.2d ___, Nos. 79-7715, -7737, -7739 (2d Cir. September 29, 1982) 12, 16, 22, 31
Teamsters v. United States, 431 U.S. 324 (1977) 23, 24, 26
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9, 23, 24, 26
Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) 16
Zipes v. Trans World Airlines, ___ U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 234 (February 24, 1982) 25

CONSTITUTION — PAGE

Fourteenth Amendment 6, 7, 25, 27

STATUTES

Title VII of The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ..... *Passim*

A.R.S. §§ 38-741 through 38-781.36 3

A.R.S. §§ 38-871 through 38-874 ..... 2, 3, 4, 28, 31, 32

A.R.S. § 41-730 12

OTHER

Rev. Ruling 68-99 and 72-25 14

IRC Cumulative Bulletins 1968-1 and 1972-1 14

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BRIEF OF PETITIONERS

Petitioners, State of Arizona ("Arizona"), Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee") and the individual members thereof in their official capacity, respectfully submit this brief in support of their position that the judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on March 11, 1982, should be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 330 (9th Cir. 1982) (Appendix A to the Petition for Writ of Certiorari). The opinion of the United States District Court for the District of Arizona entered March 12, 1980 is reported at 486 F. Supp 645 (D. Ariz. 1980) (Appendix B to the Petition).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1982. The Petition for Writ of Certiorari was timely filed in accordance with the Order of Justice Rehnquist dated May 13, 1982, which extended the time for filing the petition to and including July 12, 1982. The petition was filed on July 12, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves several provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a), and Sections 38-871 to 38-874 of the Arizona statutes.

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .

42 U.S.C. Section 2000e-2(a)(1)

A.R.S. Sections 38-871 to 38-874 have been printed in full in Appendix C of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. Description Of The Plan.

If any deferred compensation or retirement plan should be held not to violate this Court's decision in *Manhart*[2], the Arizona plan involved here is it. The deferred compensation plan held unlawful under Title VII by the courts below permitted each employee to defer whatever portion of his or her compensation he or she chose and thereafter to recover the full amount upon retirement (1) in a lump sum so that the retiree could purchase "the largest benefit which his or her accumulated contributions could command in the open market," *see Manhart, supra,* 435 U.S. at 717-18; (2) in a fixed monthly amount over a specified period of time; or (3) in the form of a life annuity with the monthly payments being made by an independent insurance company. (J.A. 7-10) The employer, the State of Arizona, made no contributions. (J.A. 6-7) The courts below held the plan unlawful under Title VII because the amount of the monthly annuity payments under the life annuity option were calculated by the insurance companies on the basis of sex-distinct mortality tables. However, all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables. (J.A. 10; R.11) If *Manhart* is extended to cover such a situation, then this case not only has serious consequences for many employers, but it will also revolutionize the insurance and pension industries.

In 1972, the State of Arizona enacted A.R.S. Sections 38-871 through 38-874 which established a Governing Committee for the purpose of establishing a deferred compensation plan.[3] In contrast with Arizona's separate and mandatory retirement plan[4], the purpose of the voluntary deferred com-

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[2] *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978).

[3] There is no attack on the statutes which established the deferred compensation plan nor on the plan itself, but only on one of the options selected by the Governing Committee, the life annuity option.

[4] Arizona has an entirely separate and independent state retirement plan. See A.R.S. §§ 38-741 through 38-781.36, as amended. The retirement plan is mandatory, and contributions and benefits are equal for similarly situated males and females.

pensation plan is solely to enable state employees to defer the receipt of a portion of their compensation until a later date to obtain tax benefits. Accordingly, the plan is financed solely through the employees' deferment of their income; there are no employer contributions to the plan. (J.A. 6-7) Indeed, the Arizona statute expressly provides that the plan is to operate without cost to the State:

> The Governing Committee shall:
>
> > (1) Arrange for consolidated billing and efficient administrative services in order that any such plans approved shall operate *without cost or contribution from the state* except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans.

A.R.S. § 38-871 C.1 (emphasis added).

The plan is offered to all state employees (approximately 35,000) on a voluntary basis. (J.A. 6) As of August 18, 1978, there were 1,675 employees who chose to participate in the plan, of whom 681 were women. (J.A. 6)

The deferred compensation plan works in two phases. During the first or "accumulation" phase, employees are free to choose from a wide variety of investments selected by the Governing Committee into which their deferred compensation can be directed, including savings accounts, mutual funds, life insurance, or annuities. The companies chosen have included Lincoln National Life Insurance Company, National Investors Life Insurance Company, Valley National Bank of Arizona, Variable Annuity Life Insurance Company, the Hartford Insurance Company, ITT Life Insurance Corporation, Keystone B4 Mutual Fund, and the Arizona State Employees Credit Union (which replaced the Valley National Bank). (J.A. 7-9) If the employee desires to change the investment into which his or her deferred compensation is directed, the employee is free to do

so. Amounts contributed by a male or female employee to the same investment earn income at the same rate. There has been no attack on this phase of the plan.

During the second or "pay-out" phase, usually at retirement, the employee can elect to recover the full amount of the deferred compensation through a variety of means: the employee can elect to have his deferred compensation and earnings thereon paid to him (1) in a lump sum, (2) in a fixed monthly sum over a specified period of time, or (3) in the form of a life annuity. (J.A. 7-10)

Regardless of the original choice of investment, an employee is free to make an entirely different election as to what form of benefits to receive at the time he or she becomes eligible for them. (J.A. 11)

What the respondent is complaining about is the result produced by voluntarily exercising that pay-out option which gives her back her deferred compensation in the form of a life annuity provided by an independent insurance company. All of the insurance companies available to the State of Arizona use sex-based actuarial tables to calculate the amount of monthly annuity payments to be made over an employee's expected lifetime. (J.A. 10) This results in lower monthly payments to female employees because the monthly payments to a woman are expected to be made over a longer period of time than to a man since every woman has the same probability of outliving a man of the same age.[5]

Accordingly, even though the amount expended to purchase the annuity is equal for similarly situated male and

[5] For instance, in the case of the respondent, assuming that she does not change the amount which is being deferred by her and that she does not change her election to invest her deferred compensation in the fixed annuity contract offered by Lincoln National Life Insurance Company, the total value of her account at age 65 would be $53,890.93—the same as a similarly situated male—but her annuity payment paid by Lincoln National Life would be $320.11 per month for her life, whereas the annuity payment for the male would be $354.06 per month for his life. (J.A. 12) Whether the respondent or a similarly situated male employee will receive more total retirement income will depend on their respective longevity.

female employees, and even though the amount of the monthly annuity payment is determined by the independent insurance carriers (over which petitioners have no control), respondent argues that the differential in monthly benefits *paid by the independent insurance carriers* constitutes illegal discrimination *by her employer.*

II. The Proceedings Below.

On May 3, 1975, the respondent Nathalie Norris, an employee of the State of Arizona in the Department of Economic Security, made an application to the Governing Committee to participate in the deferred compensation plan. She requested that her contributions be invested in the fixed annuity contract offered by Lincoln National Life Insurance.[6] Two days later she filed charges with the EEOC complaining about the plan.

On April 25, 1978, respondent, on behalf of herself and the class of females now or in the future enrolled in the deferred compensation plan, brought an action against petitioners, alleging that the differential in monthly benefits produced by the life annuities for men and women constituted a violation of Title VII by her employer by reason of this Court's decision in *Manhart,* as well as a violation of the Fourteenth Amendment. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343.

Both parties moved for summary judgment in the district court on the basis of a joint statement of stipulated facts. (J.A. 4 *et seq.*) The district court determined that petitioners were in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e *et seq.,* on the ground that the benefits paid by the insurance companies under the life annuity option were determined on the basis of sex-based mortality tables and were thus unlawful under the *Manhart* decision. However, the district court specifically found that Arizona and the Governing Committee did not purposefully

[6] The plaintiff is currently deferring $199.50 per month into the plan. (J.A. 11)

discriminate against female employees so as to violate the Fourteenth Amendment and dismissed that claim. The district court enjoined petitioners from carrying out their obligations under the deferred compensation plan through the use of sex-based actuarial tables and directed that future annuity payments to retired female employees be made equal to those for similarly situated male employees. Petitioners timely appealed the decision, and the Court of Appeals affirmed the judgment.

The inevitable result of this decision has been to force petitioners to remove the life annuity option from the available offerings pending a final decision of this issue. Now none of the present state employees, male or female, can select the life annuity option and all are thus equally treated. Only those female employees who have already retired and selected the life annuity option can be said to have been benefited by this decision. The active employees who have lost the option of a life annuity are the losers.

SUMMARY OF ARGUMENT

In *Manhart*, this Court held that the "requirement that men and women make unequal contributions to an employer-operated fund" violated Title VII, but warned that Title VII was not intended to revolutionize the insurance and pension industries.

The State of Arizona, the employer in this case, does not require unequal contributions or make unequal payments. It has simply withheld payment of wages in the amount directed by its employees to enable them to obtain tax-deferred treatment of the amount withheld, and has offered a variety of investments through insurance carriers and other organizations into which the deferred compensation can be placed for interim growth and later be recouped. One option of recoupment is for the employees to contract with one of the insurance carriers for a life annuity. The private, independent insurance carriers are

responsible for the payment of the monthly annuity benefits, which they calculate on the basis of sex-distinct actuarial tables, as permitted by state law.

Accordingly, the State of Arizona has not discriminated against anyone on the basis of sex. Respondent is attempting to hold Arizona liable under Title VII because the private insurance carriers use sex-based actuarial tables. Since all insurance carriers available to Arizona use sex-based actuarial tables, Arizona had no choice but to offer sex-based annuities if it was to offer them at all. This cannot constitute a violation of Title VII because, unlike the employer in *Manhart* which was responsible for the requirement that women contribute more to the pension fund than men, Arizona is not responsible for the calculation or payment of the unequal monthly benefits by the insurance companies. Recent decisions of this Court evidence that an employer, or other defendant, will not be held to have discriminated against women because of conditions or obstacles in the marketplace, which conditions or obstacles were not created by the employer or defendant. *See, e.g., Harris v. McRae,* 448 U.S. 297 (1980); *General Electric Co. v. Gilbert,* 429 U.S. 125, 139 (1976).

Indeed, the open market exception recognized by this Court in *Manhart* acknowledges that an employer should not be subjected to liability because of the fact that a female cannot purchase as large a benefit as a male employee from companies in the open market. The Court carefully stated that nothing in its holding "implies that it would be unlawful for an employer to set aside equal retirement contributions . . . and let each retiree purchase the largest benefit" possible on the open market. 435 U.S. at 717-718. Since Arizona not only grants its employees the option of receiving their compensation in a lump sum and then purchasing the largest benefit available on the open market, but also offers employees a variety of life annuities which reflect those available on the open market, Arizona must be held to come within the open market exception pronounced in *Manhart.*

Furthermore, since Arizona had no choice but to offer life annuities based on sex-distinct actuarial tables if it was to offer them at all (since all available insurance carriers used them), it had no intent to discriminate against females. It offered life annuities "despite" the insurance carriers' use of sex-based actuarial tables, not "because of" them. Indeed, the district court held that Arizona had no discriminatory motive. Since proof of discriminatory intent is critical in proving liability under Title VII for discriminatory treatment, its absence requires reversal of the judgment against petitioners. *See, e.g., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Moreover, an affirmance of the Court of Appeals' decision here would cause Title VII to "revolutionize the insurance and pension industries," a result this Court excluded in *Manhart.* If employers are held liable for the practices of insurance carriers, then many employers will, as Arizona has already done, cease to offer life annuities to their employees, profoundly affecting the insurance and pension industries.

Finally, the lower court's order directing petitioners to compensate female employees such that their benefits be equalized to those of males was in error. By statute, Arizona was not to contribute to the deferred compensation plan; employees simply contributed that portion of their income which they desired to defer. The instant order constituted an abuse of discretion by imposing damages upon a party which was not responsible for the unequal benefits and whose legislature had made a non-discriminatory judgment that the plan was to be "without cost" to the state.

ARGUMENT

I

UNDER THE REASONING OF THIS COURT'S DECISION IN *MANHART*, PETITIONERS WERE NOT LIABLE UNDER TITLE VII.

The Court of Appeals in the instant case concluded that "Arizona's plan is unlawful under *Manhart*." *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (1982). However, *Manhart* is not only distinguishable from the instant case, but the express reasoning of this Court in *Manhart* demonstrates that petitioners should not have been held liable under Title VII.

In *Manhart*, the employer required female employees to make monthly contributions to a retirement fund which were 14.84% higher than the contributions required of comparable male employees because as a class women live longer than men, and, therefore, more monthly payments could be expected to be made to the average woman than to the average man. Since the employees' contributions were withheld from their paychecks, a female employee took home less pay than a male employee earning the same salary. This Court held that the employer's conduct violated Title VII because that statute "precludes treatment of individuals as simply components of a racial, religious, sexual or national class." 435 U.S. at 708.

However, the decision in *Manhart* was quite narrow. No private insurance companies were involved. This Court expressly limited its holding of a violation of Title VII to "an employer-operated pension fund" and stated that it was not suggesting that Title VII was intended to revolutionize the insurance and pension industries:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.

435 U.S. 702, 717.

A. In The Instant Case, Unlike *Manhart*, Independent Insurance Companies, Not The Employer, Treated Females Differently On The Basis Of Sex

Unlike *Manhart* where the employer was responsible for requiring the unequal contributions on the basis of sex, in the instant case Arizona is not responsible for the insurance carriers' use of sex-based actuarial tables which determine the size of the monthly benefits which they pay each beneficiary. Moreover, here, no contributions are *required* at all. A State of Arizona employee is free to choose to defer a portion of present salary. If the employee chooses to use the sum total to purchase a life annuity from a private insurance company, a similarly situated man will receive greater monthly payments than a woman. However, as was found by the district court, this classification was one of the insurer's judgment, not the defendant's.

Additionally, in the instant case, all insurance companies available to contract with Arizona used sex-based mortality tables to calculate payments to pay life annuities. (J.A. 10) Accordingly, Arizona had no choice, if it was to offer life annuities, but to offer annuities based on sex-distinct mortality tables.

Hence, unlike *Manhart* where *the employer* required female employees to contribute more than males, a practice this Court found discriminatory, in the instant case the employer has not discriminated. Respondent's complaint really challenges the practices of the non-party, independent insurance carriers which uniformly used sex-based actuarial tables. The simple act of Arizona's offering its employees an option to elect to receive deferred compensation in the form of life annuities from various insurance companies which used sex-based tables does not amount to employer use of sex-based actuarial tables.

Recognizing this dilemma, the Court of Appeals cited this Court's language in *Manhart* that an employer cannot avoid his responsibilities "by delegating discriminatory programs to cor-

porate shells" because Title VII applies to any agent of a covered employer, 435 U.S. at 718 n.33. It then concluded that "[t]he reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designates certain companies to operate the plan." *Norris*, 671 F.2d at 334.

However, there was nothing in the record which indicates—nor could there be—that the independent insurance carriers here, like Lincoln National Life Insurance Company and Hartford Insurance Company, are corporate shells. Nor can they properly be considered "agents" of Arizona since the essence of the principal-agent relationship is the principal's power to control the activities of the agent. *See General Building Contractors Association, Inc. v. Pennsylvania*, ___ U.S. ___, 102 S.Ct. 3141, 73 L.Ed. 2d 835 (June 29, 1982); *Peters v. Wayne State University*, ___ F.2d ___, No. 79-1658, -1670, -1671 (6th Cir. October 14, 1982). They are independent contractors selected after competitive bidding. A.R.S. § 41-730.

In *Peters v. Wayne State University, supra*, the Sixth Circuit held that the Teachers Insurance and Annuity Association (which was a legal reserve life insurance company providing a retirement plan for employees of Wayne State University) was not an agent of Wayne State University because "Wayne State exercises no control over Teacher's Annuity, otherwise essential to a principal agent relationship." Slip op. at 4.[7] In *General Building Contractors Association, Inc. v. Pennsylvania, supra*, 73 L.Ed. 2d 835, this Court held that a union which operated a discriminatory hiring hall, which hall only came into existence by agreement with the employers' trade associations, was not the agent of the associations or of the employers because (1) essential to the establishment of agency was the principal's right to control the physical activities of the servant, and (2) the power to *oppose* the union was not tantamount to the right to *control it*. 73 L.Ed. 2d at 851.

[7] *But see Spirt v. Teachers Insurance and Annuity Association*, ___ F.2d ___, Nos. 79-7715, -7737, -7739 (2d Cir. September 29, 1982) (holding that insurers in that case were "so closely intertwined" with the employer that they could be deemed agents).

Likewise, in the instant case, petitioners do not have the right to control the activities of the independent insurance companies; their power, if any, to oppose the insurance companies is not tantamount to the right to control them.

Accordingly, Arizona's plan is not unlawful under the reasoning of *Manhart*. Arizona is not responsible for the use of the sex-based actuarial tables by the independent insurance carriers which results in the disparate monthly benefits for similarly situated males and females. The insurance carriers cannot be considered either a corporate shell or an agent of the petitioners such that the petitioners are responsible for the practices of the latter. The instant case would attempt to hold petitioners liable for the use of sex-based distinctions by insurance companies simply because the employer made the services offered by the insurance carriers available to its employees. Neither *Manhart* nor common sense holds that offering an employee the opportunity to deal with a third party is "discriminating against" an employee.

B. The Instant Plan Falls Squarely Within The Open Market Exception Stated In Manhart And Is Therefore Lawful.

In *Manhart*, this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

There are two reasons why the instant case falls squarely within the open market exception stated by this Court in *Manhart*. First, employees have the option of receiving their deferred compensation in the form of a lump sum so that they can "purchase the largest benefit which [their] accumulated contributions could command in the open market."

Second, even if an employee does not choose to exercise the right to receive deferred compensation in the form of a lump sum, the life annuities offered by the insurance carriers through Arizona's plan exactly reflect what is available in the open market. Since it has been stipulated that all insurance companies available to Arizona use sex-based mortality tables in calculating their annuities, an employee could purchase no greater benefit on the open market than he could through the companies participating in Arizona's deferred compensation plan.

Without citing any authority, the Court of Appeals rejected petitioners' position that the plan falls within the open market exception on the grounds that although the lump sum option treats men and women the same, "Arizona has also offered a benefit which favors men" and "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d 330, 335.

However, since all employees have the option of receiving their deferred compensation in the form of a lump sum, petitioners should be found to have satisfied the open market exception. The reason that petitioners also offered various life annuities provided by various companies as a part of the plan was because the lump sum would be subject to tax at the time of payment, thereby reducing the amount available with which to purchase an annuity. This additional option permitted employees to purchase life annuities using the full amount of their deferred compensation.[8]

In effect, the Court of Appeals' ruling means that the only way by which petitioners could qualify for the open market exception would be to force their employees to take their deferred compensation in a lump sum, which would then be subject to tax, and use the remaining money to purchase the

[8] See Rev. Ruling 68-99 and 72-25, I.R.C. Bulletins 1968-1 and 1972-1, respectively.

same type of annuities on the open market which petitioners could directly offer the employees through the plan without subjecting them to the immediate tax.

The courts below apparently assumed (contrary to the record) that if respondent had been free to go into the "open market" and had had an unlimited selection from the available insurance companies, she could have found a life annuity that was not based upon a sex-based actuarial table and which would have paid her the same amount as a male. However, as hereinbefore set forth, the record in this case establishes that "all tables presently in use provide a larger [monthly] sum to a male than to a female." (J.A. 10) Therefore, the choices available to the respondent under the Arizona plan are equivalent to those offered on the open market and do not result in a "benefit which favors men" in a prohibited way. *Manhart's* open market exception should not be read to mean that an employer can qualify for the exception only if it subjects its employees to the tax consequences of receiving their contributions in a lump sum which reduced amount is then used to purchase benefits on the open market but that it cannot offer them the option of directly purchasing that exact annuity thereby avoiding the tax consequences.[9]

Petitioners have done no less than required by this Court in *Manhart* to qualify for the open market exception: Petitioners "set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-718. It is submitted that the questioned option is in fact an "open market" purchase by the employee, for it cannot occur without employee choice and direction. The fact that Arizona granted the additional tax benefit of permitting employees to transmit their deferred income directly to independent insurance companies which were available and

[9] Also, by purchasing a life annuity through the plan the employee gets the benefits of being part of a group which results in greater annuity dollars per dollar of investment. If forced to purchase the annuity individually with a lump sum payout, the employee gets less for his or her dollar.

willing to contract with petitioners does not restrict the freedom of choice upon which the open market exception is based. Respondent has nowhere indicated that her freedom to purchase the largest benefit which her accumulated contributions could command on the open market was in any way restricted by petitioners' plan.

None of the other cases in which the lower courts have held pension or retirement plans violative of Title VII on the basis of unequal benefits, has provided the same freedom of choice or so perfectly reflected the open market as the instant plan does.[10] To the contrary, the concurring opinion in *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), recognized that such freedom of choice as exists here could be a critical difference in determining liability. In that case, Chief Judge Coffin stated that he was not certain that under *Manhart* an employer could *never* offer a benefit plan using sex-based mortality tables, and that a plan with genuine employee options (as in the instant case) might legally include unequal, actuarially sound pension and life insurance benefits:

> The plan that is before us, as I see it, fails because it is as if the company paid its male and female employees equal salaries, but in the form of chits, that could be redeemed only in a particular store which, the company knew, would give to one sex more for the same number of chits than to the other sex. . . . Perhaps, however, once they turn their attention to the problem, the parties could work out a system permissible under *Manhart* that would elimi-

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[10] *E.g., Spirt v. Teachers Insurance and Annuity Association*, ___ F.2d ___ Nos. 79-7715, -7737, -7739 (2d Cir. 1982) (no options available, participation in TIAA-CREF plans was mandatory); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (no options available; employees were required to participate in plans provided by TIAA-CREF); *Hannahs v. Teachers Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981) (participation in retirement plan was mandatory); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981) (employees were required to join the plans offered by the retirement system); *Henderson v. State of Oregon*, 405 F. Supp. 1271 (D. Ore. 1975) (all employees were required to contribute to the fund).

> nate the chit-like nature of the contributions through a set of genuine employee options or other features. If so, perhaps the system could legally include unequal, actuarially sound pension and life insurance benefits for participating men and women.

589 F.2d at 1146 (concurring opinion).

Hence, the Arizona plan's provisions for 1) payment of a lump sum by which employees can purchase the largest benefit available on the open market and 2) a meaningful range of options which exactly reflect the open market, so that employees can avoid being subjected to taxation on their lump sum, place this action within the open market exception provided by *Manhart*.

II

PETITIONERS CANNOT BE HELD LIABLE UNDER TITLE VII FOR PRACTICES IN THE MARKETPLACE OVER WHICH THEY HAVE NO CONTROL

Since all actuarial tables in use by the insurance industry were sex-based (J.A. 10), if Arizona was to offer a life annuity option to its employees at all, it had no choice but to offer life annuities based on the sex-based mortality tables utilized by the insurance industry.

Recent decisions of this Court evidence that a defendant will not be held to have discriminated against women because of conditions or obstacles which exist in the marketplace, which were not created by the defendant and over which it had no control. *See Harris v. McRae*, 448 US. 297 (1980); *Los Angeles Department of Water and Power v. Manhart, supra*, 435 U.S. 702; *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 (1976). Furthermore, this Court has held that the employer or defendant had no obligation to additionally compensate women because of those conditions or obstacles. *Id.*

In *General Electric Co. v. Gilbert, supra,* this Court held that the exclusion of coverage in General Electric's disability plan for disabilities arising from pregnancy did not constitute prohibited sex discrimination in violation of Title VII. In so ruling, this Court expressly recognized that the employer was not responsible for the fact that coverage for pregnancy would impose an additional cost for the coverage purchased on the open market. The employer's mere failure to purchase that additional coverage for females was therefore not prohibited discrimination:

> If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to pregnancy . . . . Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. 125, 139 n.17.

Likewise, in *Manhart,* this Court suggested that the fact that a female could not purchase as large a benefit as a male employee on the open market should not subject the employer to liability under Title VII or require it to additionally compensate her:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

In *Harris v. McRae, supra,* 448 U.S. 297, this Court considered, *inter alia,* whether the Hyde amendment, by denying public funding for certain medically necessary abortions, contravened the Due Process Clause of the Fifth Amendment. Again, it explained that while the state itself may not impose obstacles in the exercise of a woman's freedom of choice, it need not remove those obstacles not of its own creation:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher:* although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

448 U.S. at 316.[11]

Similarly, this Court in *Nashville Gas Co. v. Satty,* 434 U.S. 136, 142 (1977), expressly recognized that while Title VII did not allow an employer to place a burden on female employees because of their differing role in life, an employer is not required because of Title VII to provide greater economic benefits to one sex over the other because of those differing roles. It therefore held that an employer did not violate Title VII by its practice of giving sick pay to all employees disabled by reason of nonoccupational sickness or injury but not to those disabled by pregnancy. Likewise, here, petitioners do not place

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[11] The Court of Appeals attempted to distinguish *Harris v. McRae* on the grounds that there the state refused to remove an obstacle to an indigent woman's exercise of her right to obtain an abortion, whereas here, Arizona "affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women." The distinction is semantical, not real. Arizona's plan did not affirmatively impose a burden; it merely set aside equal contributions and made available what the marketplace had to offer. In both *Harris* and the instant action, the plaintiff expected the state to additionally compensate her for a condition not of the state's creation: in *Harris,* the condition was her indigence; here, the insurance company's use of sex-based actuarial tables.

burdens on women, for all similarly situated employees may make equal contributions to the plan. However, Arizona does not violate Title VII because it does not make additional contributions to women to compensate for the fact that insurance companies calculate their monthly annuity benefits at a lower rate because of their greater expected longevity.

The foregoing cases demonstrate that an employer will not be held to have discriminated because of conditions or obstacles which it did not create and over which it had no control. In each case, this Court distinguished between the imposition of burdens or obstacles by an employer which discriminate against a group, and an employer's mere failure to take affirmative action to eliminate discrimination not of its own making. *Cf. General Building Contractors Association, Inc. v. Pennsylvania, supra,* 73 L.Ed.2d at 853 (employers not liable under 42 U.S.C. § 1981 where they "merely failed to ensure that plaintiffs enjoyed employment opportunities equivalent to that of whites" and did not intentionally discriminate themselves against plaintiffs).

In the instant case, Arizona did not impose any burdens on or place obstacles in the way of its female employees. Contributions for similarly situated employees were equal and the actuarial value of their deferred compensation at the time benefit rights accrue was the same. Having treated its employees equally, it only refrained from additionally compensating females to make up for the fact that all insurance carriers in the open market required from them a greater initial payment for identical monthly benefits than they do from men. Like *General Electric Co. v. Gilbert* and *Nashville Gas Co. v. Satty,* Title VII does not require the employer to pay the "incremental amount" necessary for a female to obtain as full a benefit as her male counterpart in the open market. Like the state in *Harris,* the State of Arizona did not place obstacles in the path of its female employees' exercise of their freedom of choice in purchasing life annuities, and need not remove those not of its own creation which are the result of the practices of the insurance carriers in using sex-based actuarial tables.

Nonetheless, the Court of Appeals in the instant case ruled — without citing any authority — that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d at 335. This statement misstates and glosses over the real issue. The issue is not whether an employer can institute or maintain a discriminatory policy as long as it "reflects the marketplace," but whether an employer's liability extends to conditions in the marketplace which it did not create. As the Court of Appeals states the issue, the employer has instituted or maintained its own discriminatory practice, but then attempts to excuse such practice because it "reflects the marketplace — that is *Manhart*. In contrast, in each of the above-referenced cases the employer did not institute the discriminatory practice and was therefore not held responsible for the acts of others over whom it had no effective control, even though it permitted its employees to be subjected to them. In each case, the employer was held not to have an affirmative obligation to eliminate discrimination caused by others and over which it had no control.

The reasoning of the above-referenced cases of this Court has been applied elsewhere by the lower courts in Title VII cases. *E.g., Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977); *Briggs v. City of Madison*, 536 F.Supp. 435 (W.D. Wis. 1982); *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982); *cf. Airline Pilots Association International v. Western Air Lines, Inc.*, 23 FEP Cases 1042, 1044-45 (N.D. Cal. 1979). In *Briggs v. City of Madison, supra*, a Title VII case, plaintiffs contended, *inter alia*, that it was no defense for the defendant city to point to market demands as its justification for upgrading the pay ranges of the public health sanitarians (who were all males) but not to raise the pay of the public health nurses. The district court rejected this contention and ruled:

> Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the

> marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants.

536 F.Supp. at 447.

Likewise, in *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982), plaintiff brought an action pursuant to Title VII and Section 1983 alleging that the benefits which she received under the Rhode Island Temporary Disability Insurance Act discriminated against her on the basis of sex because she received a smaller amount of benefits for disability owing to pregnancy than other disabilities. Despite the enactment of the Pregnancy Discrimination Act which amended Title VII to include discrimination on the basis of pregnancy, the district court concluded that the employer did not have an affirmative obligation to remedy discrimination suffered by its pregnant employees at the hands of a disability fund operated by others:

> While this language suggests that Congress intended to afford pregnant women the right to equal treatment in the employment setting, there is no indication that Congress intended to enforce this right by requiring employers like Hospital Trust to take affirmative steps to remedy discrimination suffered by its pregnant employees at the hands of others.

28 FEP Cases at 1769.

Petitioners submit that the Court of Appeals erred in holding them liable under Title VII for practices in the marketplace over which they had no control.[12] The instant case is in

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[12] The lower court cases which have held an employer responsible under Title VII for the practices of an insurance company which used sex-based actuarial tables all involved Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF), which were established by the Carnegie Foundation solely for the purpose of servicing educational institutions and with which the employer was held to be closely intertwined. Even then, there is a split in the circuits as to whether the employer should be held liable. In *Spirt v. Teachers Insurance and Annuity Association, supra*, No. 79-7715, -7737, -7739, the Second Circuit held that TIAA-CREF were "so closely intertwined" with the University that they must

[*Footnote continued on following page*]

stark contrast with *Manhart* where the employer itself required larger contributions from female employees, thus creating and controlling the very burden imposed upon its female employees. Here, similarly situated employees made equal contributions; the receipt of unequal monthly benefits, if they elected a life annuity, was a result of the use by independent insurance companies of sex-based actuarial tables, over which petitioners had no control.[13]

III

PETITIONERS CANNOT BE HELD LIABLE FOR DISCRIMINATORY TREATMENT UNDER TITLE VII WHERE THERE IS A FINDING THAT PETITIONERS DID NOT INTEND TO DISCRIMINATE.

It is now well settled that where an employee alleges less favorable treatment on the basis of race or sex under Title VII, proof of discriminatory motive "is critical." *Teamsters v. United States,* 431 U.S. 324, 333 n.15 (1977); *accord, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 580 (1978); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 (1973).

[*Footnote continued from preceding page*]
be deemed an employer for purposes of Title VII, and held that the employer was liable for TIAA-CREF's practices since they exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees. In contrast, in *Peters v. Wayne State University, supra,* Nos. 79-1658, -1670, -1671, the Sixth Circuit held that TIAA was not the university's agent because the university exercised no control over it. In *EEOC v. Colby College, supra,* 589 F.2d 1139, the First Circuit simply vacated the district court's dismissal of the complaint and remanded the case, noting that it foresaw difficulties which did not arise in *Manhart* "in light of the Court's caveat that the statute was not intended to revolutionize the [insurance industry]." *Id.* at 1144. In the only other Title VII case of this type involving insurance companies, *Sobel v. Yeshiva University,* 477 F.Supp 1161, 1166 (S.D.N.Y. 1979), the district court simply concluded that the action could not be decided on summary judgment because of the difficulty in applying *Manhart* to a pension plan funded through a private insurance company.

[13] This Court has held that the power "to oppose" is not "tantamount" to a "right to control." *General Building Contractors Association, Inc. v. Pennsylvania, supra,* 73 L.Ed.2d at 851.

In *Teamsters v. United States,* this Court held that proof of discriminatory motive was critical where disparate treatment under Title VII was alleged:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, *e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 265-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Teamsters v. United States, id., 431 U.S. 324, 335 n.15.

Likewise, in *Texas Dept. of Community Affairs v. Burdine, supra,* this Court held that in Title VII cases involving discriminatory treatment, "[t]he ultimate burden of persuading the trier of fact that the defendants *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253 (emphasis added).[14]

Respondent in the instant action alleges that she has been disparately treated on account of her sex. Accordingly, proof of discriminatory intent was "critical." However, in the instant case, the district court expressly found that the petitioners did

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[14] Proof of intent is not required where "the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 252 n.5; *Teamsters v. United States, supra,* 431 U.S. at 335-336 n.15. However, the instant case does not involve a facially neutral employment practice since the use of sex-based actuarial tables is clearly not facially neutral. Indeed, the decisions of this Court have analyzed the use of sex-based actuarial tables in terms of disparate treatment, not impact. See *Manhart, supra,* 435 U.S. at 708, 716 (where this Court refers to "treatment of individuals" and subsequently acknowledges that plaintiffs may not be able to establish a prima facie case under Title VII on the theory that "the effect of the practice on women as a class was discriminatory"); *Connecticut v. Teal,* ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed. 2d 130 (June 21, 1982) (where this Court stated that *Manhart* involved a facially discriminatory policy).

not have a discriminatory motive (and therefore held that petitioners had not violated the Equal Protection Clause of the Fourteenth Amendment):

> From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are [sic] the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

Norris v. Arizona Governing Committee, 486 F.Supp. 645, 651 (D. Ariz. 1980).

Accordingly, since petitioners did not intend to discriminate, they cannot be held liable for discriminatory treatment under Title VII.

Nonetheless, the Court of Appeals in the instant case rejected the requirement of intent and erroneously concluded that the absence of discussion in *Manhart* on the issue of intent should be construed as a holding that intent need not be proven: "Manhart required no affirmative showing of intent. Nowhere was the need to prove intent discussed." 671 F.2d at 333.

However, in *Manhart*, intent to discriminate was obvious. The issue was never raised,[15] for there could be no dispute that the employer intended to treat women employees differently from men: it was the employer which decided that all women would have to make larger contributions from men and therefore the employer clearly intended to treat women differently. In contrast, in the instant case, Arizona was not responsible for the practice which treated women differently than men. Any disparate treatment was the result of the use of sex-based mortality tables by private insurance carriers. Accordingly, the

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[15] Where an issue is not raised, statements by the Court, or the lack thereof cannot be construed as rulings. *See Zipes v. Trans World Airlines*, ___U.S. ___, 102 S.Ct. ___, 71 L.Ed. 2d 234 (February 24, 1982) (holding that filing requirement under Title VII was not jurisdictional despite language in previous cases, where the requirement was not at issue in those cases).

lack of discussion in *Manhart* on the issue of intent was not because intent was not required, but because there could be no issue that an employer which *determined* that women would have to make greater contributions than men intended to treat them differently.

The Court of Appeals in the instant case alternatively held that no showing of intent was necessary because "facially discriminatory practices are intentional discrimination for purposes of Title VII regardless of the subjective motivation." 671 F.2d at 334.

However, whether "facially discriminatory practices" amount to intentional discrimination by an employer depends upon whether it is the employer who is responsible for the facially discriminatory practice. The two cases cited by the Ninth Circuit for its position, *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973) and *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972) (which predate *Burdine* and *Teamsters*) involved facial discrimination by an employer which locked women as a class out of employment opportunities. In *Krause*, the employer refused to hire a woman as a bartender simply because she was a woman; *Schaeffer* involved a Title VII challenge to the rule of a taxi company which refused to permit female drivers to work more than eight-hour days, although male drivers were allowed to work nine-hour days. Clearly, in both cases, the employer intended to treat females differently from males, and the employer itself was responsible for the practice which treated them differently. Neither case stands for the proposition that a showing of intent is not necessary in order to hold an employer liable for discriminatory treatment.

Hence, unlike cases where the employer intends to treat employees differently on the basis of race or sex—whether for benign or malevolent reasons—in the instant case, petitioners did not intend to treat females differently. Arizona had no choice but to make available life annuities based on sex-distinct actuarial tables if it was to offer them at all since all available insurance companies used such tables. Petitioners' decision to

make lifetime annuities available was not made "because" they were based on sex-based tables but "in spite of" that fact, since the only annuities offered by the insurance carriers were sex-based.

In *Personnel Administrator of Mass. v. Feeney,* 422 U.S. 256 (1979), a case construing the Fourteenth Amendment,[18] this Court ruled that the concept of discrimination implied that the decisionmaker selected a particular course of action "because of" and not merely "in spite of" its adverse effects upon an identifiable group. In *Feeney,* the plaintiff challenged the constitutionality of a Massachusetts veterans' absolute preference statute on the ground that it discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment, since the statute benefited an "overwhelmingly" male class. However, in holding that the statute did not establish a classification that was overtly or covertly based upon gender, this Court ruled that the foreseeability of the statute's impact on women did not amount to discrimination under the Fourteenth Amendment. It concluded that discrimination requires that a particular course of action be selected "because of" and not merely "in spite of" its adverse effect:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. [Citation omitted.] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Mass. v. Feeney, id., 442 U.S. at 279.

Similarly, in the instant case, petitioners' decision to make available to its employees lifetime annuities as one alternative

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[18] This Court has ruled that the concept of discrimination which has evolved from court decisions involving the Equal Protection Clause of the Fourteenth Amendment is a "useful starting point" for purposes of interpreting the term "discrimination" under Title VII. *General Electric Co. v. Gilbert, supra,* 429 U.S. 125, 133.

for recouping their tax deferred compensation was not made "because of" any alleged adverse effects on females but "in spite of" any such effects because the only actuarial tables in use by the insurance industry were sex-based. The district court in this action concluded that petitioners did not purposefully discriminate. Accordingly, the Court of Appeals erred in holding that petitioners violated Title VII since not only was there no proof of intent to discriminate, but the district court even made a contrary finding.

IV

THE RELIEF ORDERED BY THE COURTS BELOW IS AN ABUSE OF DISCRETION.

In the instant case, the district court permanently enjoined the petitioners from carrying out their obligations under A.R.S. § 38-871 et seq. "through the use of sex segregated actuarial tables, . . . and . . . direct[ed] that [future] annuity payments to female employees who have retired shall be equal to similarly situated male employees." *Norris v. Arizona Governing Committee, supra,* 486 F.Supp 645, 652. The Court of Appeals affirmed the relief.

However, the insurance companies which calculate and make the annuity payments on the basis of sex-based actuarial tables are not parties to this action, and indeed the Court of Appeals noted that the district court had not "required the companies to pay the adjusted annuities." 671 F.2d at 333. Hence, although the district court conceded that the development of the sex-based mortality tables was the result of the insurers' judgment, and not the petitioners, 486 F. Supp at 651, it is the petitioners, and not the insurance companies, which have been ordered to additionally compensate female employees.

Although Title VII provides that a court should order such affirmative action as may be appropriate, *Manhart, supra,* 435 U.S. at 718, it has been held inappropriate to require those who

did not instigate an unlawful employment practice and who acted only in a passive role to pay damages therefor. *E.g., Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Guerra v. Manchester Terminal Corporation*, 498 F.2d 641 (5th Cir. 1974); *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579 (2nd Cir. 1976); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 673 (M.D.N.C. 1974).

In *Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), the Fourth Circuit held that a corporate trustee of a discriminatory profit-sharing and retirement plan, which provided different benefits to male and female participants, should not be held liable for damages because of its passive role in the illegal discrimination. In *Chastang*, under the retirement plan sponsored by the defendant employer, a female's share of the fund would become non-forfeitable earlier than that of a similarly situated male. Although the Fourth Circuit held that Equitable Trust Company, which acted as corporate trustee for the plan, was properly joined in the suit so as to be bound to carry out any determination reached by the court, it held that it should not be liable for damages because of its passive role in the illegal discrimination:

> As corporate trustee for the plan, Equitable should be bound to carry out any conclusion reached by the court with respect to the plan's illegality. Thus, it was proper to join Equitable in this suit, and Equitable should have been retained as a party until a final decree was entered. Of course, because of Equitable's passive role in the illegal discrimination, it should not be held liable for the damages awarded to plaintiffs.

Chastang v. Flynn & Emrich Co., id., 541 F.2d at 1044.

In the instant case as well, petitioners are in a position not entirely dissimilar to the corporate trustee in *Chastang*. Petitioners were not responsible for the use of the sex-based actuarial tables by the private insurance companies and merely

played a passive role by contracting with insurance companies in order to give their employees the option of recouping their deferred compensation in the form of life annuities.

Again, in *Hairston v. McLean Trucking Company, supra,* 62 F.R.D. 642, the district court held that since the local union took no affirmative action in the discrimination — although it knew of the company's actions and encouraged such discrimination by its own inaction — it did not have to pay any part of the back-pay award, and only one-third of the costs and attorneys' fees awarded. *Id.* at 673.

In a non-Title VII suit, *Ortega v. Usery,* 441 F.Supp 100 (D. Conn. 1977), the district court denied, *inter alia,* the plaintiff's application for a preliminary injunction requiring the State of Connecticut to guarantee unemployment compensation payments, where the State of Connecticut merely acted as a "conduit" through which payment was made to claimants. There, plaintiffs challenged the allegedly excessive delays by the State of Connecticut in the processing of interstate unemployment compensation claims. Because the State of Connecticut did not determine the eligibility of the claimants nor pay the benefits, but merely acted as a conduit for their claims to other states where the claimants were formerly employed, the district court held that it was "totally unwarranted" to require the state to guarantee payments:

> With respect to an interstate claimant, the potential for delay is even more acute. Interstate claims are forwarded by Connecticut to the state where the claimant was formerly employed. Connecticut does not determine eligibility nor is it responsible for payment; it is merely a conduit through which payment is made to the claimant. Under these circumstances, injunctive relief requiring the State of Connecticut to guarantee payments to interstate claimants within a 14-day period would be totally unwarranted.

Ortega v. Usery, id., 441 F. Supp at 104.

In the instant case as well, the State of Arizona simply acts as a conduit between the employee and the particular insurance company which is actually responsible for the payment of annuities. The petitioner Governing Committee merely contracts with insurance companies, bank trustees or custodians, and investment counseling firms to provide as great a variety for the return of deferred compensation to its employees as it can.

It is significant that in the only case other than the instant one involving an insurance company, where the court has ordered that monthly annuity benefits for females be equalized to those of males, the insurers (TIAA-CREF), which were also parties to the suit, were the ones required to change to gender-neutral mortality tables and to calculate and pay benefits so that female and male benefits would be equal. The employer was simply enjoined from making contributions to any pension fund using sex-based mortality tables. *Spirt v. Teachers Insurance and Annuity Association, supra,* nos. 79-7715, -7737, -7739. Only in the instant case has an employer in a completely passive role been ordered to additionally compensate the female employees receiving a lower monthly annuity benefit from an insurer.

In addition, the relief ordered here constitutes an abuse of discretion because it overturns the nondiscriminatory judgment of the state legislature that the plan was to operate "without cost or contribution from the state . . . ." A.R.S. § 38-871 C.1. There was no finding in this case—nor could there be—that the decision of the Arizona legislature to establish a voluntary deferred compensation plan "without cost" to the state was discriminatory or unfair in any way. The legislature merely intended to grant Arizona's employees the opportunity to obtain tax-deferred benefits by deferring a portion of their income. Nonetheless, the relief ordered by the courts below goes beyond remedying those acts of Arizona which were found discriminatory (and which only constituted the act of con-

tracting with insurers, not the development of sex-based actuarial tables) and also overturns the admittedly nondiscriminatory judgment of the legislature that the plan was to be without cost to the state.

An abuse of discretion in Title VII cases may be found where the ordered relief will fall in large part on "innocent third parties." *Manhart*, 435 U.S. 702, 723; *Ford Motor Company v. EEOC*, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721, 737 (June 28, 1982). In *Manhart*, this Court based its conclusion that it was error to grant retroactive relief in part because "[t]he harm would fall in large part on innocent third parties." 435 U.S. at 723.[17] Likewise, in *Ford Motor Company v. EEOC*, *supra*, this Court rejected the lower court's suggestion that the employer must promise to a discharged employee retroactive seniority along with a job offer in order to cut off its back pay liability, since such a rule would place "a particularly onerous burden on the innocent employees of an employer charged with discrimination": The employer would be able to cut his back-pay liability only by forcing his incumbent employees to yield seniority to a person who had not proven unlawful discrimination. *Id.* at 737.

In the instant case, the lower courts' order for relief also impacts upon innocent third parties—the Arizona taxpayers—whose legislature merely intended to set up a deferred compensation plan for state employees, without cost to the taxpayer. A.R.S. § 38-871 C.1. Despite that nondiscriminatory legislative judgment, and despite the fact that petitioners merely set aside the deferred salary of employees, the lower courts would have the State of Arizona provide additional contributions for those female employees choosing life annuities (thereby providing female employees with a larger retirement

[17] The relief granted in this case is, in effect, retroactive in nature. While not requiring reimbursement for benefit payments already made by the insurance carriers, it nonetheless requires the State of Arizona to fund payments that were not contemplated by respondent, the insurance carriers, or petitioners. It requires additional payments for annuities which have already been funded, and for which no additional reserves had been saved by anyone. This was the very reason this Court denied retroactive relief in *Manhart*.

fund) so that the benefits provided by the insurance companies which use the sex-based actuarial tables could be equalized to those provided males over their shorter lifetimes. These additional contributions would ultimately come from the taxpayers whose legislators had simply intended to provide a means for an employee to defer taxes on a portion of his or her income until a later date, without cost to the state.

CONCLUSION

For all the foregoing reasons, petitioners request that this Court reverse the judgment of the Court of Appeals, and order that judgment be entered in their favor.

Respectfully submitted,

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